

D.P.U. 96-23

Petition of Boston Edison Company, pursuant to General Laws Chapter 164, §§ 76 and 94 and 220 C.M.R. §§ 1.00 et seq. for review of its electric industry restructuring proposal.

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INTERLOCUTORY ORDER ON APPEAL BY CABLEVISION SYSTEMS
CORPORATION OF ITS INTERVENTION STATUS AND ON PETITION OF
THE NEW ENGLAND CABLE TELEVISION ASSOCIATION, INC. FOR LEAVE TO
INTERVENE LATE

I. INTRODUCTION

On July 9, 1997, Boston Edison Company (?BEC? or "Company") filed a petition for the Department of Public Utilities (?Department?) to review its electric industry restructuring proposal. The petition was docketed as D.P.U. 96-23. On August 4, 1997, Cablevision Systems Corporation ("Cablevision") filed a petition for leave to intervene ("Petition"). On August 8, 1997, the Company filed an opposition to Cablevision's petition ("Opposition"). On August 13, 1997, Cablevision filed a reply to the Company's opposition ("Reply"). On August 18, 1997, the Company filed a final reply to Cablevision's petition ("Final Reply").

Additionally, on August 18, 1997, the New England Cable Television Association, Inc. ("NECTA") filed a petition for leave to intervene late ("NECTA Petition"). On August 21, 1997, the Company filed opposition to NECTA's petition ("Opposition to NECTA Petition"). On August 22, 1997, NECTA filed a response to the Company's opposition to its petition ("NECTA Response").

On August 19, 1997, the Department conducted a procedural conference at which the Hearing Officer ruled on all the timely filed petitions to intervene.¹ At that conference, the Hearing Officer denied Cablevision's petition for full intervenor status because she determined that Cablevision had not shown that it would be substantially and specifically affected by this proceeding, but granted Cablevision limited participant status (Tr.1, at 18,19). On August 22, 1997, Cablevision filed an appeal from the denial of its petition ("Appeal"). On August 26, 1997, BECo filed an opposition to Cablevision's Appeal ("Opposition to Cablevision Appeal").

II. APPEAL OF HEARING OFFICER'S RULING

A. Positions of the Parties

1. Cablevision

In support of its petition for leave to intervene in this case, Cablevision states that it is a video and telecommunications company located within Massachusetts, which, through its subsidiaries and affiliates,² owns and operates cable television systems in 38 cities and towns in Massachusetts, including Boston, Brookline and Framingham (Petition at 1). Cablevision contends that it has a substantial stake in this proceeding as a customer of BECo and as a competitor and potential competitor of BECo's affiliated video and telecommunications venture (*id.*). In addition, Cablevision notes that cable television systems operated by Cablevision subsidiaries and affiliates pay fees to BECo for attachment to poles (*id.* at 1, 2). Regarding Cablevision's interest as a competitor of BECo, Cablevision contends that BECo's joint venture through its subsidiary Boston Energy Technology Group ("BETG") with Residential Communications Network, Inc. ("RCN") to provide cable television and other telecommunications services in Boston, Brookline, and other Massachusetts communities may have a substantial effect on competition in the cable television and communications industries, as well as on customers of BECo and pole attachment rates (*id.* at 2). Specifically, Cablevision

¹ The Hearing Officer allowed the Company an opportunity to file a response to NECTA's late-filed petition and, thus, did not rule on NECTA's petition at the conference.

² The Company lists such affiliates and subsidiaries as Cablevision of Boston, Inc., Cablevision of Framingham Holdings, Inc., and A-R Cable Partners (Petition at 2).

notes that the proposed Settlement includes a provision that the Company intends to invest \$150 million in BETG (Reply at 1, 2). Cablevision argues that to the extent this proceeding determines whether BECo can invest that money in BETG and/or the terms on which BETG is permitted to use or acquire BECo's assets, the proceeding will substantially and specifically affect Cablevision (*id.* at 2). In addition to its impact on competition, Cablevision argues that such investment raises substantial questions about BECo's efforts to mitigate stranded costs (*id.* at 5). Cablevision posits that an unconditional transfer of up to \$150 million to BETG to support BETG's joint venture with RCN is unlikely to maximize the mitigation of stranded costs because it anticipates the use of Boston Edison assets under terms and conditions that are not specified in the Settlement. Further, Cablevision contends that it seeks to insure that BECo's investment in the RCN-BETG joint venture is in compliance with the Department's Order in Boston Edison Company, D.P.U. 93-37 (June 18, 1993), subsequent rate orders, G.L. c. 164 ?? 17A and 94B, and Bay State Gas Company, D.P.U. 91-165 (1992) (*id.*).

In its Appeal, Cablevision reiterated its argument that it should be granted full party status to investigate the propriety of BECo's proposed investment of \$150 million in BETG (Appeal at 5). Additionally, Cablevision contended that its interests will not be adequately addressed by other parties (*id.*, citing Conservation Law Foundation v. Mosbacher, 966 F.2d 39, 44 (1st Cir. 1992)). Cablevision argues that the Attorney General cannot adequately represent its interests because the Attorney General is both a party to the Settlement and is not representing the interests of competitors to BECo, a status claimed by Cablevision (*id.* at 5). Lastly, Cablevision argues that the denial of Cablevision's petition violates the principle of reasoned consistency (*id.* at 8).³ Cablevision contends that the hearing officer's denial of its petition to intervene as a full party violates this principle because: (a) other competitors and some potential competitors of BECo were permitted to intervene in this proceeding, and (b) at least one party that was accorded full party status indicated that it intends to address BECo's stranded costs and investments (*id.*).⁴

2. BECo

BECo argues that Cablevision has no interest that will be substantially and specifically affected by the proceeding (Opposition at 1). BECo states that Cablevision's primary concern is with the video and telecommunications joint venture between BETG and RCN and that the electric industry restructuring plan before the Department in this proceeding has nothing to do

³ Cablevision argues that the Supreme Judicial Court has observed that "[a] party to a proceeding before a regulatory agency such as the [Department] has a right to expect and obtain reasoned consistency in the agency's decision" (Appeal at 8, citing Robinson v. Department of Public Utilities, 416 Mass. 668, 672 (1993)).

⁴ Cablevision notes that the hearing officer granted full party status to Enron Capital & Trade Resources ("Enron"), which stated at the procedural conference that its cross-examination of BECo would be on the issues of stranded costs and BECo's investment in metering technology, an area in which Cablevision claims Enron has an interest as a potential competitor with BECo (Appeal at 8, 9, n. 7, citing NYPSC Case 94-E-0952, In the Matter of Competitive Opportunities Regarding Electric Service, "Comments of Enron Capital & Trade Resources to the ESCO Metering Subgroup Staff for Report of March 13, 1997.").

with the joint venture (*id.*). BECo also asserts that Cablevision's interest as a possible competitor of this venture is irrelevant (*id.*). BECo argues that Cablevision is not a competitor of BECo, nor is it a competitor within the electric industry (Opposition at 2).

BECo further contends that there is nothing in the proceeding concerning pole attachment rates⁵ or proposed additional investments by BECo in the proposed venture (*id.*). BECo argues that Section V.D of the Settlement concerns the parties' agreement to support a request for additional funding of BECo's wholly owned subsidiary, BETG (*id.*, n.1). BECo further argues that it has not made such a request to the Department and no such request is before the Department in this proceeding (*id.*). BECo asserts that this proceeding will clearly not result in a determination of whether or not BECo may invest an additional \$150 million in BETG or determine the terms on which BETG is permitted to use or acquire BECo assets (Final Reply at 1- 2). BECo argues that if it does propose to make such an investment, a proceeding before the Department will be required pursuant to G.L. c. 164, § 17A. BECo additionally argues that Cablevision's concern with the Settlement's compliance with D.P.U. 93-37, the Department's Order authorizing BECo's initial investment in BETG, is misplaced because it claims there is nothing in this proceeding regarding investments in subsidiaries or joint ventures (*id.*).

BECo also argues that Cablevision's status as a customer of BECo is insufficient to establish that there is an interest that is "substantially and specifically affected" (*id.* at 2, citing Robinson v. Department of Public Utilities, 416 Mass. 668, 673-74 (1993) (individual ratepayer must show "peculiar damage" for full party status); Attorney General v. Department of Public Utilities, 390 Mass. 208, 216-7, n. 7 (1983) (upholding denial of full party status where customer did not allege peculiar damage, notwithstanding the fact that he would have raised some issues not pressed by any other party)). BECo contends that Cablevision has not adequately explained what peculiar interest it might have as a customer, apart from the interests of customers in general (*id.* at 2). BECo asserts that Cablevision's participation will add nothing to the proceeding and will only serve to confuse the issues before the Department and delay the proceeding (*id.*).

III. NECTA'S PETITION TO INTERVENE LATE

A. Positions of the Parties

1. NECTA

In support of its petition, NECTA states that it is a non-profit corporation and regional trade association representing substantially all cable television companies in the New England region, including those in the Commonwealth of Massachusetts (NECTA Petition at 1). NECTA further states that member companies provide cable service to communities in the BECo franchise area and that such members attach their cables to poles owned solely by BECo or jointly by BECo and NYNEX pursuant to pole attachment agreements between such members and BECo, or BECo and NYNEX (*id.*). NECTA further states that such member companies are subject to pole attachment fees to BECo, and in some cases to NYNEX (*id.* at 2, 3). NECTA argues that the ability of NECTA members to conduct their business is

⁵ BECo notes that Cablevision and other parties have recently initiated a "Complaint and Request for Hearing" before the Department in D.P.U. 97-82 "seeking relief from unlawful and unreasonable pole attachment fees" and that such a docket is a more appropriate forum to deal with the issue (Opposition at 1).

heavily dependent upon such pole attachments and that the timeliness of cable system upgrades, quality of service, costs of doing business and ability to compete fairly are all materially affected by the practices of BECo as an owner or joint owner of poles (*id.* at 3).⁶ NECTA also argues that the Settlement provides that the signing parties will support BECO's request to increase its investment in its wholly-owned subsidiary BETG by up to \$150 million in addition to the \$45 million presently authorized (*id.*).

NECTA further contends that the ongoing arguments regarding the proper scope of BECo's corporate reorganization docket, D.P.U. 97-63, currently before the Department, may result in a foreclosure of opportunity for NECTA to argue its concerns in that docket, should the decision on proper scope effectively preclude NECTA's involvement (*id.* at 4, 5; NECTA Response at 1, 2). NECTA specifically argues that its concerns over BECo's distribution charges and affiliate transactions might be precluded from being heard in future proceedings if those concerns fail to be considered in this proceeding and the terms of the Settlement, as currently drafted, are found to be acceptable (NECTA Petition at 5, 6).⁷ NECTA argues that the Settlement would conflict with Massachusetts statutes if interpreted to (1) foreclose non-signing parties from complaining about BECo's rates pursuant to G.L. c. 164, § 93 contrary to G.L. c. 164, § 94C, (2) foreclose the calling into question of affiliate transactions in BECo's G.L. c. 164, § 94 rate filings contrary to G.L. c. 164, § 94C or (3) preclude the Department from adjusting BECo's rates to exclude improper cross-subsidies, all until after January 1, 2001 (*id.* at 6). NECTA contends that given the continuing uncertainty about the scope of D.P.U. 97-63 and the potential for substantive interplay between the Settlement and D.P.U. 97-63, good cause exists for NECTA's late intervention in this matter (*id.* at 6-7).

Additionally, NECTA argues that its members are substantially and specifically affected by the provisions of the Settlement as pole attachment licensees and competitors of BECo's unregulated affiliates (*id.* at 7). Specifically, NECTA argues that such members are substantially and specifically affected by possible cross-subsidies of BECo's unregulated affiliates that may be buried in BECo's distribution charges and access charges (*id.*).

NECTA further contends that no other party which has heretofore petitioned to intervene in this proceeding can adequately represent NECTA in this proceeding and argues that even if the Department determines that NECTA's reasons for lateness are unpersuasive, the Department should nevertheless balance that determination against the importance of the issues raised by NECTA (*id.*; NECTA Response at 6). NECTA also states that the allowance of NECTA's late intervention in this matter is fully consistent with the May 21, 1993 Hearing

⁶ NECTA notes that certain pole attachment agreement rates and terms imposed by BECo are now the subject of a complaint filed by several cable operators on August 1, 1997.

⁷ NECTA argues that under one reading of the Settlement, Section I.B and VI.H, taken together, would restrict the application of those conditions until after January 1, 2001, at the earliest, and prevent any corrective rate adjustments until after January 1, 2001. Thus, NECTA argues, it would be necessary for NECTA to contest in this case the Settlement terms governing the distribution charges of BECO in order to expressly permit parties to call into question BECo affiliate transactions, as authorized under G.L. c. 164 §§ 93, 94 and 94C (NECTA Petition at 5).

Officer ruling in Boston Edison Co., D.P.U. 93-37, on the amended late petition of the Reading Municipal Light Department (NECTA Petition at 7). NECTA lastly argues that it does not seek to file comments late and will abide by any procedural schedule to be established in this matter and therefore, its participation as a party will not delay this proceeding or prejudice any other party (*id.*).

2. BECo

BECo argues that NECTA's petition is late with no sufficient explanation (Opposition to NECTA Petition at 1). BECo contends that Cablevision, a member of NECTA, filed a timely petition, but that NECTA chose not to petition at the same time as Cablevision (*id.* at 2). BECo argues NECTA's interest in the proceeding is no different than Cablevision's and that the Department's ruling on NECTA's petition should be consistent with its ruling on Cablevision's petition, which, BECo argues, was properly denied at the August 19, 1997 procedural conference (*id.*). BECo argues that the question of whether NECTA has an interest that will be substantially and specifically affected by this proceeding has already been decided in connection with Cablevision's petition (*id.* at 3). BECo contends that NECTA is essentially an association of cable television operators and can have no greater standing than that of its member utilities (*id.*).

BECo additionally argues that NECTA's desire to contest the distribution charges of BECo in order to call into question BECo affiliate transactions is misplaced in this proceeding in that the proceeding is not a full rate case and no costs are being presented for approval or disapproval (*id.*). BECo concludes that the issues of competition in the telecommunications and cable television industry and the proper level of pole attachment rates are irrelevant to the issues in this electric industry restructuring proceeding (*id.* at 4).

III. STANDARD OF REVIEW

The Department's regulations require that a petition to intervene describe how the petitioner is substantially and specifically affected by a proceeding. 220 C.M.R. ? 1.03 (1)(b); *see also* G.L. c. 30A, ? 10. In interpreting this standard, the Department has broad discretion in determining whether to allow participation, and the extent of participation, in Department proceedings. Attorney General v. Department of Public Utilities, 390 Mass. 208, 216 (1983); Boston Edison Company v. Department of Public Utilities, 375 Mass. 1, 45 (1978) (with regard to intervenors, the Department has broad, but not unlimited discretion), *cert. denied*, 439 U.S. 921 (1978); *see also* Robinson v. Department of Public Utilities, 835 F.2d 19 (1st Cir. 1987). The Department may allow persons not substantially and specifically affected to participate in proceedings for limited purposes. G.L. c. 30A, ? 10; 220 C.M.R. ? 1.03(1)(e); Boston Edison, 375 Mass. at 45. A petitioner must demonstrate a sufficient interest in a proceeding before the Department will exercise its discretion and grant limited participation. Boston Edison, 375 Mass. at 45. The Department is not required to allow all petitioners seeking intervenor status to participate in proceedings. *Id.*

In addition, when ruling on a petition to intervene or participate, a Hearing Officer may consider, among other factors, the interests of the petitioner, whether the petitioner's interests are unique and cannot be raised by any other petitioner, the scope of the proceeding, the potential effect of the petitioner's intervention on the proceeding, and the nature of the petitioner's evidence, including whether such evidence will help to elucidate the issues of the proceeding, and may limit intervention and participation accordingly. *See, e.g.,* Hearing Officer's Ruling on Petitions to Intervene, D.P.U. 92-111 (1992); Hearing Officer's Ruling,

D.P.U. 90-284 at 3 (April 24, 1991); Interlocutory Order on Appeal of Hearing Officer Ruling, D.P.U. 88-250 at 5, 6 (March 21, 1989). The Department exercises the discretion afforded it under G.L. c. 30A, § 10 so that it may conduct a proceeding with the goal of issuing a reasoned, fair, impartial and timely decision that achieves its statutory mandate. Procedural Order, Berkshire Power Development, Inc., D.P.U. 96-104 (January 9, 1997).

In ruling on late-filed petitions to intervene, or otherwise participate in its proceedings, the Department takes into account a number of requirements and factors in its analysis. First, the Department considers whether a petitioner has demonstrated good cause for late-filing. See 220 C.M.R. § 1.01(4). While "good cause" may not be readily susceptible of precise definition, the proponent of a waiver must make a convincing showing of good cause and may not reserve such a showing for a later appeal of the Hearing Officer's ruling. See Bay State Gas Company, D.P.U. 95-52, at 2 Interlocutory Order (July 21, 1995). Administrative efficiency requires that a proponent of a waiver state all available grounds at the time the ruling is requested. If the Department finds that there is good cause and that the petitioner is substantially and specifically affected, then the Department balances the extent of participation against the need to conduct a proceeding in a complete, efficient and orderly fashion.⁸

IV. ANALYSIS AND FINDINGS

In support of its late-filed petition, NECTA cites the "continuing uncertainty" about the scope in D.P.U. 97-63, the Company's corporate restructuring proceeding. The Department finds that this argument lacks merit. The deadline for intervention in this proceeding was on August 4, 1997. Intervention petitions were due in D.P.U. 97-63 on August 7, 1997. Uncertainty, to the extent there is any, therefore, existed as of August 4, 1997. Nevertheless, NECTA failed to timely file a petition. Moreover, Cablevision, who has similar involvement in both D.P.U. 96-23 and D.P.U. 97-63, filed timely petitions in both cases. Accordingly, the Department finds that NECTA has not established good cause for its late-filed petition. Nevertheless, even if the Department were to determine that good cause does exist, the Department would deny NECTA's petition for the following reasons.

In their respective petitions to intervene, Cablevision and NECTA raise numerous issues, including BECo's financial transactions with its affiliate, BETG, and their impact on competition in the cable industry and the Company's stranded cost calculations. Cablevision specifically raises the issue of BECo's anticipated investment in BETG. Both parties have claimed that they may be substantially and specifically affected by the resolution of these issues, and that such resolution should take place in this proceeding. Accordingly, Cablevision and NECTA contend that they should be allowed full intervenor status in this proceeding.

As an initial matter, the Department must determine whether the issues raised by Cablevision and NECTA are within the scope of this proceeding. The Settlement is presented to the Department as a resolution of issues raised in D.P.U. 96-100, the generic electric industry restructuring docket, and D.P.U. 96-23, the Company's specific industry restructuring

⁸ When balancing, the Department has considered: (1) the extent of the delay, (2) the effect of the late participate on the ongoing proceeding, and (3) the explanation for the tardiness. Western Massachusetts Electric Company, D.P.U. 92-8C-A at 5 (1993); NYNEX, D.P.U. 94-50, at 3 (1994).

plan. As part of its investigation of the Settlement, the Department will review, among other things, (1) the unbundled retail delivery rates; (2) the calculation of the access charge; (3) the standard offer; (4) the performance standards under the retail access tariffs; and (5) the environmental plan.

While the Settlement refers to the Company's intention to make an additional investment in BETG, the Department's review of the Settlement will not address the merits of such an investment.⁹ Pursuant to G.L. c.164, § 17A, the Company is required to obtain Department approval before making any investment in an affiliate. Thus, should BECo seek at some point in the future to make an investment of \$150 million in BETG, the Department would be required to determine whether such an investment is in the public interest. The Department notes that although the signatories have agreed not to oppose the Company's anticipated request for approval of an investment under G.L. c. 164, § 17A, other interested persons could petition to intervene in that proceeding. Thus, the Department finds that BECo's anticipated investment in BETG is not an issue in this proceeding. Therefore, to the extent Cablevision and NECTA rely on this issue to support their claim that they may be substantially and specifically affected by this proceeding, full intervention must be denied.

Cablevision and NECTA have also raised issues regarding previous and possible future transactions between BECo and its affiliates, from both the competitor and ratepayer perspectives. With respect to potential future affiliate transactions, the Department finds that such an issue is beyond the scope of this proceeding. In so finding, however, the Department does not discredit the importance of the issue. In fact, the Department has determined that an inquiry of the issue is warranted. As we noted recently, our existing Standards of Conduct, 220 C.M.R. §§ 12.00 *et seq.* do not apply to a distribution company's relationship with its non-energy-related affiliates. Boston Edison Company, D.P.U. 97-63, Interlocutory Order on the Scope of the Proceeding and Petitions for Leave to Intervene, at 13 (September 2, 1997). The Department has stated that in light of ongoing electric restructuring and its implications on affiliate transactions, the Department intends to open a rulemaking proceeding to amend the existing Standards of Conduct by expanding their applicability to a distribution company's transactions with its non-energy-related affiliates. *Id.* Because the issue of future affiliate transactions is beyond the scope of this proceeding, Cablevision's and NECTA's assertions on this ground that they may be substantially and specifically affected by this proceeding must fail.

Cablevision raised issues regarding the consistency of the settlement with the Department's order in Boston Edison Company, D.P.U. 93-37 (1993) with respect to past affiliate transactions. Cablevision claims that BECo has transferred assets to its affiliate and, such transfers impact BETG's competitive position in the cable industry as well as the accuracy of BECo's stranded cost calculations. Inasmuch as the Settlement addresses issues related to BECo's role in the developing competitive market for electricity, the Department determines that issues raised with respect to BECo's position in other competitive industries are not relevant here unless it affects BECo's ratepayers.¹⁰ Therefore, Cablevision and NECTA, as competitors

⁹ The Department recognizes that parties may have misinterpreted the scope of this proceeding based on an information request posed to the Company (DPU-1-17). The Department's intent in posing the question was to clarify that the Company did not seek Department approval of the investment at this time.

¹⁰ As the Department noted in the D.P.U. 97-63 Interlocutory Order, if the petitioners

and potential competitors of BECo's cable endeavors, do not have standing in this proceeding.¹¹

Nonetheless, Cablevision claims to be a BECo ratepayer. NECTA claims to have members who are BECo ratepayers. The Attorney General, who has intervened as of right in this proceeding, is charged with protecting ratepayer interests. Neither Cablevision nor NECTA has not shown that, as a ratepayer, its interests are not adequately represented by the Attorney General. Therefore, the Department finds that neither Cablevision nor NECTA are substantially and specifically affected by this proceeding.

With respect to the subject of pole attachment rates raised by both Cablevision and NECTA, the issue is governed by separate statute and regulations. G.L. c. 166, § 25A; 220 C.M.R. §§ 45.00 *et seq.*; see also Boston Edison Company, D.P.U. 97-82. The Settlement does not address pole attachment rates. Accordingly, the Department finds that the issue of pole attachment rates is beyond the scope of this proceeding.

Accordingly, the petitions of Cablevision and NECTA to intervene as full parties are hereby denied. Nevertheless, the Department will allow both Cablevision and NECTA to participate in this proceeding on a limited basis, to include the opportunity to receive copies of all filings, attend hearings and conferences, and file briefs.

believe that BECo has in some way violated the Department's directives in D.P.U. 93-37, they may file a petition requesting that the Department commence an investigation into the matter (*id.*).

¹¹ Cablevision and NECTA note the allowance of several BECo competitors as full party participants in this proceeding. The Department notes that these participants are competitors with BECo in the *electric industry* and as such have a clear interest in BECo's proposal to restructure its electricity operations. More importantly, these participants have established their substantial and specific interest in this proceeding through prior Department electric industry restructuring proceedings in D.P.U. 95-30 and 96-100.

V. ORDER

Accordingly, after due consideration, it is

ORDERED: That the petition for leave to intervene of Cablevision Systems Corporation is hereby DENIED; and it is

FURTHER ORDERED: That Cablevision Systems Corporation is hereby allowed limited participant status in this proceeding; and it is

FURTHER ORDERED: That the petition for leave to intervene of the New England Cable Television Association is hereby DENIED; and it is

FURTHER ORDERED: That New England Cable Television Association is hereby allowed limited participant status in this proceeding.

By Order of the Department,

Janet Gail Besser, Commissioner

John D. Patrone, Commissioner